

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

FRANKIE JAMES GARNER

Petitioner,

v.

LOIS RUSSO,

Respondent.

Civil Action No. 04-12017-EFH

**RESPONDENT'S MOTION TO DISMISS
PETITION FOR WRIT OF HABEAS CORPUS**

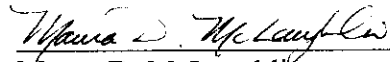
Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the respondent, Lois Russo, respectfully submits this motion to dismiss the petition for writ of habeas corpus filed by the petitioner, Frankie James Garner, on the grounds that the petition fails to state a claim upon which relief may be granted. In support of this motion, and as is set forth more fully in the accompanying memorandum of law, the respondent states that the petitioner has failed to exhaust the claims stated in his petition for a writ of habeas corpus. Specifically, the petitioner has not presented either the factual or legal bases of four of the six claims he now asserts to the Massachusetts Supreme Judicial Court. Because the petitioner has not yet provided the state's highest court with the first opportunity to pass on the merits of these claims, the petition should be dismissed. 28 U.S.C. § 2254(b)-(c); *Rose v. Lundy*, 455 U.S. 509, 510 (1982).¹

¹ Respondent's remaining defenses are not addressed here because the doctrine of exhaustion mandates dismissal of the petition. In the event that this Court declines to dismiss the petition due to failure to exhaust, the respondent reserves the right, and requests the opportunity, to file an answer and assert all other applicable defenses.

WHEREFORE, the respondent respectfully requests that this Court dismiss this habeas petition on the grounds that it contains unexhausted claims.

Respectfully submitted,

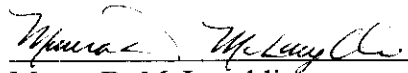
THOMAS F. REILLY
ATTORNEY GENERAL


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Dated: November 16, 2004

CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2004, I caused a copy of the above document to be served by first-class mail, postage prepaid, upon the *pro se* petitioner, Frankie James Garner, Souza Baranowski Correctional Center, P.O. Box 8000, Shirley, Massachusetts 01464.


Maura D. McLaughlin